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No. 06-562

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* HURON VALLEY STEEL CORPORATION IN SUPPORT OF PETITIONER

By Written Consent of Petitioner and Respondent

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QUESTION PRESENTED

Whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, *et seq.*, but that does not satisfy the requirements for bringing an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. §9613(f), may bring an action against another potentially responsible party under Section 107(a), 42 U.S.C. §9607(a).

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INTEREST OF HURON VALLEY STEEL CORPORATION

Amicus Huron Valley Steel Corporation ("HVSC") is one of several defendants in Solutia, Inc. and Pharmacia Corporation v. Mc Wane, Inc., et. al., No. CV-03-PWG-1345-E, presently pending in the United States District Court for the Northern District of Alabama. In the Solutia case, Plaintiffs, which are presently cleaning up PCB contamination in a Superfund site in Anniston, Alabama, have brought contribution and cost recovery claims under CERCLA against numerous industrial companies that operate, or have operated, facilities in the Anniston area, including HVSC, which engages in recycling of non-ferrous scrap metal at its Anniston facility.

A group of these defendant companies in the Solutia case, including HVSC, has entered into an administrative settlement agreement with the United States Environmental Protection Agency ("EPA"). In that agreement, the settling companies have agreed to do a removal action in a second Superfund site in Anniston, Alabama, removing lead from residential yards. In many instances, the lead contaminated yards also contain PCB contamination. In many of those situations, HVSC and the other settling companies have agreed to remove both lead and PCB from the contaminated yards.

In the administrative settlement agreement, EPA has determined that HVSC and other settling companies have committed to and are doing their fair and equitable share of both lead and PCB cleanup; therefore, EPA has given those parties contribution protection for both lead and PCB matters under CERCLA, 42 U.S.C. §9622.

HVSC and the settling companies have moved for summary judgment in the Solutia case. That motion is now pending before the United States District Court for the Northern District of Alabama on the exact question certified for review in this case[1], whether §107(a) of CERCLA permits a potentially responsible party ("PRP") to recover its costs for cleaning up contaminated property from another PRP. This Court's answer to this question may be determinative of the issues in the Solutia case.

HVSC is concerned that if this Court should find that §107(a) of CERCLA permits a PRP to recover its costs for cleaning up contaminated property from another PRP, that finding would require companies, like HVSC, to incur defense costs in addition to the cleanup costs to which it committed, relying upon the contribution protection provisions of CERCLA.

SUMMARY OF ARGUMENT

It is HVSC's position that a PRP that does not satisfy the requirements for bringing a contribution action under §113(f) of

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[1] Though the question certified for review qualifies the affected PRP as one who does not satisfy the requirements from bringing an action under §113, such qualification is not necessary. Respondent Atlantic Research Corporation has never denied that it is a potentially responsible party under CERCLA, and has intimated in its response to the United States' initial Petition for Writ of Certiorari that it was eligible to bring an action for contribution against the government under Section 113. The decision of the court below has also noted Atlantic Research is "partly responsible" for cleaning up property contaminated by hazardous substances. These facts make the questions exact in this matter and the Solutia case.

CERCLA cannot bring an action against another PRP under §107 (a). No private right of action for contribution or cost recovery in favor of a PRP exists under §107 of CERCLA. Congress expressly reserved to the federal and state governments the right of cost recovery under §107, even when those governments are liable parties at a Superfund site, but did not extend that right to private parties. A comparison of the language of §§107 and 113 clearly demonstrates that since the enactment of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), §107 of CERCLA, has not provided a means of cost recovery in favor of PRPs. The legislative history of CERCLA, as amended by SARA, makes it clear that Congress created the contribution provisions in §113 of CERCLA as the *exclusive* means for PRPs to obtain contribution. Therefore, this Court should not find such a private right of implied contribution, nor should it judicially create one, in §107 of CERCLA. Finally, HVSC contends that sound considerations of public policy mandate that §§107 and 113 of CERCLA should be strictly construed to effectuate the intent of Congress.

ARGUMENT

I.

THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PROVIDE A PRIVATE RIGHT OF CONTRIBUTION UNDER §107.

§107 defines the classes of liable parties and provides that they shall be liable for a broad range of specified costs. §107 is the section under which the federal and state governments and Indian tribes recover response costs for study and remediation

of Superfund sites. It has also been held that an innocent party which volunteers to clean up a Superfund site could recover its costs from liable parties under this section.

The controversy in litigation concerning §107 has centered upon whether it provides to a PRP which incurs response costs an implied right of contribution against other PRPs. Initially, federal courts split on this point. Some courts cited the federal rule that creation of private rights of action by implication is not favored. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). Other courts held that recognition of an implied right of contribution was necessary in order to effectuate Congressional intent that parties liable for contamination should share in the costs of remediation. See *United States v. New Castle County*, 642 F. Supp. 1258 (Del. 1986). This court, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 162; 125 S. Ct. 577; 160 L. Ed 2d 548; 2004 U.S. Lexis 8271 (2004)("Cooper Industries" or "Aviall"), observed that "That conclusion was debatable in light of two decisions of this Court that refused to recognize implied *** rights to contribution in other federal statutes." (Citations omitted.)

That split of authority continued to exist when Congress adopted SARA in 1986. At that time, Congress moved to clarify the contribution issue. In its report on P.L. 99-499 (the bill which enacted SARA), the lead committee in the House of Representatives, the Committee on Energy and Commerce, noted the following in its statement of "Background and Need for the Legislation":

CONTRIBUTION ACTIONS

> The Bill would give potentially responsible parties the explicit right to sue other liable or potentially liable parties who also may be responsible for the hazardous waste site. If a party has resolved its liability to the US or a state in a judicially-approved, good-faith settlement, the party would not be liable for claims for contribution or indemnity on matters addressed in the settlement. These provisions should encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups.

1986 U.S. Code Cong. & Admin. News, p. 2841.

In §113 of CERCLA, SARA provided all of the means and mechanisms for dealing with contribution claims. It specified who could seek contribution, under what circumstances a contribution claim would lie, and when a contribution claim could be pursued, i.e., after a settlement resolving one's liability or after an enforcement action had begun. §113 also provided guidelines for allocation of liability between potentially responsible parties and time limitations; thus, it is a complete cost recovery/contribution provision. It is clear and unambiguous on its face. When a statute provides an express remedy in clear and unambiguous terms, that remedy is the sole one available; courts may not seek to alter or expand the remedy or create alternative remedies. 73 *Am. Jur. 2nd Statutes*, §§173-74, pp. 370-371, citing *Olsen v. State of Nebraska*, 313 U.S. 236, 246; 615 S. Ct. 862; 85 L. Ed. 1305 (1941):

> We are not concerned ***with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be

left where *** it was left by the Constitution—to the states and the Congress." (Citations omitted.)

Further, it is clear that §107 simply does not work as a basis for a PRP's cost recovery claim. Can one reasonably assume that Congress would provide to a private PRP a right of recovery in one section, with all the appropriate mechanisms, and in another section with none of the necessary administrative provisions? The question answers itself. From the language of CERCLA, it is clear that Congress provided a remedy - an exclusive remedy - to a private PRP in §113.

II.

LEGISLATIVE HISTORY SHOWS CONGRESS INTENDED §113 AS THE EXCLUSIVE MEANS FOR A PRIVATE PARTY TO OBTAIN ITS CLEAN UP COSTS.

In enacting SARA, Congress did a number of things which are critically important to the question facing this Court. First, Congress confirmed its intent that a liable party which incurs costs should have a right of contribution against other PRPs. Next, it provided that parties which had settled with the government should be free from claims of contribution. Finally, it ***affirmed*** the right of the U.S. or of a state to obtain cost recovery under §107, even if it was a liable party, but ***did not*** affirm any such right in a private PRP.

It is a general rule of construction that when the legislature amends an act it thereby indicates its intent to change the original act by creating a new right or withdrawing an existing one. 1A *Sutherland Statutory Construction*, 6th Ed., 2002 revision, §22.30, pg. 357-8. That section further notes, "It has been held that it can be presumed that Congress was aware of the prior construction of the terms in question in the original act

and deliberately limited the scope of the new act." Id. pg. 358-365. *See also*, 73 *Am. Jur. 2nd Statutes*, §65, p. 280. Thus, when Congress confirmed and clarified the right of the United States or a state to proceed in cost recovery under §107 of CERCLA, ***even if it was, itself, a liable party*** but failed to provide such authority to a private party PRP, it restricted the right of a private PRP to pursue a §107 action.

In its section-by-section analysis of the report on P.L. 99-499 (the bill which enacted SARA), the House of Representatives, the Committee on Energy and Commerce noted, with respect to §113 (the contribution rights section):

> The section also confirms *a Federal right of contribution or indemnification* for persons alleged or held to be liable under section 106 or 107 of CERCLA and prohibits the assertion of such rights against a party who has entered into a judicially approved settlement with EPA.
>
> It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA. (Citations omitted). Other courts have recognized that a right to contribution exists without squarely addressing the issue. (Citations omitted). *This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties*,***. This section does not affect the right of the United States to maintain a cause of action for cost recovery under Section 107 or injunctive relief under Section 106, *whether or not the US was an owner or operator of a facility or a generator of waste at the site. Where the United States has been required to pay response costs as*

> *a generator or facility owner or operator, the United States may maintain an action to recover such costs from other responsible parties*. (Emphasis added).

Id. at 2861-62.

The Bill then went to the House Committee on the Judiciary, which made certain important revisions in the language of §113. Specifically, it struck the requirement for a "good faith" settlement (assuming that any settlement with EPA would be reached in good faith) and broadened the "judicially approved" language to include an administratively approved settlement. The Judiciary Committee Report notes that it dealt with the availability of contribution in claims under Superfund and that its amendments confirm, as did the Energy and Commerce Committee version, that potentially responsible parties have a right of contribution under CERCLA. *Id.* at 3041. The committee then went on to explain:

> The Judiciary Committee made a technical amendment to new subsection 113(g)(3)(A) of CERCLA (as re-designated by the amendment) *which affirms the ability of the United States or a State to maintain an action for *** cost recovery under section 107 against nonsettlors when a settlement does not provide complete relief.* The right of the United States to proceed under section *** 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site. In addition, when the United States has been required to pay response costs as a liable party, the United States may maintain an action to recover costs from other responsible parties.
>
> New subsection 113(g)(3)(B) of CERCLA was added by the Judiciary Committee to expressly provide to settlors

> the right to seek contribution from nonsettlors. *** As reported by the Energy and Commerce Committee, new section 113(g) of CERCLA had not by its terms affirmatively provided an express right of contribution to parties who settle with the government for some or all of the costs of a clean-up. (Emphasis added).

Id. at 3043.

The Judiciary Committee also noted that settlement with a *de minimus* party may be incorporated into either a consent decree or an administrative order [as provided under new subsection 122(g)(4)]. The Report noted, "These settlements will protect the party against the contribution claims of other persons who are liable under the Act, unless a person seeking contribution can show that the settlement was achieved through fraud, misrepresentation, other misconduct, or a mutual mistake of fact [new subsection 122(g)(5)]."

Finally, the Conference Report notes these House amendments to the bill were accepted in the final draft. *Id.* at 3315-16.

Where Congress has specified which parties can maintain cost recovery actions under §107, the courts may not, by implication, extend the express language employed by Congress. To do so would violate the rule that the courts are normally reluctant to create private rights by implication. Further, it would violate the maxim of statutory construction, "expressio unius est exclusio alterius," - mention of one thing in a statute impliedly excludes all other things.

Further, because of Congress' action in providing ***specific*** circumstances in which a PRP may assert a contribution claim and the means of doing so, the courts are not authorized to

permit the assertion of that right in a different manner. Again, the specification of the circumstances under which a contribution action will lie and the means and time of bringing it exclude all other contribution actions.

Thus, it is clear that, since the enactment of SARA in 1986, there has been no private right of action under §107 of CERCLA for contribution that can be asserted by any party except the United States or a state.

III.

WHEN THE EIGHTH CIRCUIT IGNORED THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE STATUTE, IT CREATED A NONSENSICAL, UNWORKABLE REMEDY.

The Eighth Circuit in *Atlantic Research Corp. v. United States*, 459 F. 3d 827, 831 (8th Cir. 2006) noted the major differences between Sections 107 and 113, but the court ignored them. Further, it ignored the plain statutory language of CERCLA in order to construct an equitable remedy to allow PRPs to recover their clean up costs under §107. In doing so, it substituted its judgment on policy matters for that of Congress, invading the Congressional prerogative to set national environmental policy.

Not only did the Eighth Circuit ignore the statute but it maligned the circuits which correctly followed CERCLA and their precedents preventing PRPs from utilizing §107 to recover their clean up costs from other PRPs, characterizing their enforcement of §§107 and 113 as "traffic directing." *Id.* at 832.

What caused the Eighth Circuit to abandon the clear language of the statute? The court simply did not like the result of this Court's decision in *Cooper Industries, supra*. The court made that clear: "Today, we consider whether this (our previous) ruling remains viable in the post-*Aviall* world." *Id.* at 831. Further, the Eighth Circuit said that to follow its previous rulings and in light of this Court's decision in *Cooper Industries* – a ruling based upon the plain, unambiguous language of the statute, would result in "***an absurd and unjust outcome."

However, flying in the face of the statute and its own precedent, the Eighth Circuit seemed to realize the difficulty which its ruling would create; that a liable party would suddenly have a right to recovery under a section of CERCLA which provides for full cost recovery. Still, the court had a curious solution for that problem. The court suggested that, when a liable PRP brings an action for cost recovery under §107, the defendant in that action only needs to counterclaim for contribution under §113:

> ***CERCLA, itself, checks overreaching liable parties: if a plaintiff attempted to use §107 to recover more than its fair share of reimbursement, a defendant would be free to counterclaim for contribution under §113(f). (Citations omitted) ****

Id. at 835.

The Eighth Circuit would thus encourage evermore Superfund litigation, a total, unnecessary waste of judicial resources, and the foreseeable consequence of trying to force a statutory section to be something that it is not.

IV.

TO ALLOW PRPs TO MAINTAIN A COST RECOVERY ACTION UNDER §107 WOULD DETER NEGOTIATED SETTLEMENTS WITH EPA AND EXPEDITIOUS SUPERFUND CLEANUPS.

HVSC defers to the experience of the United States in fully addressing the policy issues involving encouragement of early settlement and expeditious cleanups, but it can bring a unique perspective to this issue – that of a settling PRP.

Courts which attempt to minimize the importance of limiting contribution actions to §113 and thus energizing the contribution protections of §122, simply do not understand the motivation of settling PRPs. One of the best illustrations of this is HVSC's experience in the Anniston Lead Superfund matter. HVSC would not have entered into a settlement agreement with EPA, obligating the settling parties to do tens of millions of dollars worth of cleanup had those settling parties not received full, effective contribution protection. To eviscerate this protection by giving liable PRPs a back door right to contribution under §107 would effectively nullify the Congressionally mandated remedy process, preventing many early settlements from occurring and resulting in the necessity for the Agency to bring enforcement actions, with extensive early contribution litigation clogging the courts, in order to obtain PRP – financed cleanups. Further, in those cases where EPA was able to achieve early cleanup settlement agreements, those agreements would, in many cases, be far less favorable to the United States because settling PRPs would be forced to make much more limited commitments if they could not count on the viability of contribution protection.

CONCLUSION

Based upon the foregoing authority and arguments, this Court is respectfully urged to:

1. Rule that the Court of Appeals for the Eighth Circuit erred in finding a private right of action for a liable PRP under §107 of CERCLA; and

2. Reverse the Eighth Circuit's decision and reinstate the orders of the district courts dismissing the claims in this case.

Respectfully submitted,

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